UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

JUNTA DEL CENTRO DE SALUD
COMUNAL DR. JOSE S. BELAVAL, INC.[1]

Employer

and Case No. 24-RC-8662

UNIDAD LABORAL DE
ENFERMERAS(OS) Y EMPLEADOS DE
LA SALUD (ULEES)

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* (hereinafter "the Act") as amended, a hearing was held on January 21, February 11, and February 19, 2010, before a hearing officer of the National Labor Relations Board, herein the Board, to determine whether a question concerning representation exists, and if so, to determine the appropriate unit for collective bargaining. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[2]

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[1] The Employer's name was changed pursuant to a stipulation signed by the parties and made a part of the record (B. Ex. #2).

[2] The Employer filed a brief in support of its position which has been duly considered. No other briefs were filed. Upon the entire record in this proceeding the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

b. The record reflects that the employer, Junta del Centro de Salud Comunal Dr. Jose S. Belaval, Inc. is a non-profit corporation incorporated in the Commonwealth of Puerto Rico with a principal place of business in Santurce, Puerto Rico, where it is engaged in the

I. THE PETITIONED UNIT AND PARTIES' POSITIONS

The Petition seeks to include all professional physicians working at the Employer's facility in San Juan, PR, and excluding all other employees, guards and supervisors as defined in the Act. The Employer, contrary to the Petitioner, argues that the unit is not appropriate because all professional physicians employed at its facility are supervisors within the meaning of Section 2(11) of the Act because they supervise the nurses, and thus, are not able to organize for purposes of mutual aid or protection pursuant to the provisions of the Act.

In addition, although not initially a focus of the hearing, it was discovered that some physicians work at the Employer on a limited part time schedule, and that some physicians attend to patients in buildings other than the primary care clinic. When questioned about this fact by the hearing officer at the initial hearing, Petitioner stated that it had no desire to represent the Employer's part time physicians arguing that they do not work a sufficient number of hours to be considered regular employees, and also

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operation of an outpatient, ambulatory health clinic. Although the parties in B. Ex. 2, initially stipulated that the employer is an acute health care facility, during the course of the hearing it was revealed that the Employer does not admit patients overnight, and that it is not, in fact, an acute health care facility. After being informed by the hearing officer that the facts adduced at the hearing do not support the conclusion that the employer is an acute health care facility, the parties amended their stipulation on the record to state that the Employer is an ambulatory health clinic. (Tr. 47-48) The parties also stipulated that during the past twelve month period, a representative period of its regular business generally, the Employer had gross revenues in excess of $250,000 and it purchased and received goods and materials valued in excess of $50,000 directly from points located outside of Puerto Rico and caused them to be transported to its place of business in Santurce, Puerto Rico.

c. Based upon the facts in section b above, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

d. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

e. There is no current and effective collective bargaining agreement covering the employees in the unit sought in the petition.

f. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of section 9(c) (1) and section 2(6) and (7) of the Act.

that it was not seeking to represent any physicians that work in buildings other than the primary care clinic.[3]

The Employer expressed no position with regards to whether the unit should include the physicians who work on a regular part-time work schedule or those physicians who work in other buildings. Instead, the Employer maintained that no physicians should be represented by the Petitioner because they are supervisors under Section 2(11) of the Act.

II. THE ISSUES

1. Whether the professional physicians are supervisors pursuant to Section 2(11) of the Act?

2. Whether the petitioned unit should exclude regular part-time physicians and physicians that work in buildings other than the ambulatory health clinic?

III. FACTS

A. Description of the Belaval Medical Center

The Employer, Junta del Centro de Salud Comunal Dr. Jose S. Belaval, Inc., hereinafter referred to as the "Employer" or the "Belaval Medical Center" is an ambulatory service clinic, that provides health care to patients during visits on an outpatient basis. The Employer's facility consists of two buildings. The main building is a two-story building that houses a primary care clinic in the first floor and the administrative offices on the second floor. The primary care clinic is a facility where the

[3] Because the record was sufficiently developed to make a determination on this issue after the record was officially opened and closed, the undersigned ordered a remand of the hearing for February 11 however, the Employer's attorney failed to appear assertedly for medical reasons. The undersigned then rescheduled the hearing for 2/19 but the Employer's attorney again failed to appear because of a calendar conflict. Nevertheless, the Employer's attorney submitted for the record the employment contracts of three physicians: a pediatrician and two general doctors, who have contracts with the Employer for roughly a one year period for each.

primary care physicians see patients, perform medical assessments, and administer vaccines pursuant to a special vaccination program three times a week. On the second floor administrative area are located the offices of the accountant and two assistants, the Chief Executive Officer (CEO), the Human Resources Director and an assistant, and the Medical Director and Nurse Supervisor, among other administrative offices.

The second building, located across the street from the main facility, has a laboratory, a phlebotomy area, a nurses' triage area, offices for two doctors, and other offices, including the office of the Belaval Medical Center Administrator.

B. The Primary Care Clinic

The primary care clinic on the first floor of the main building attends to patients Mondays through Fridays from 8:00 a.m. to 8:00 p.m. and Saturdays from 9:00 a.m. to 1:00 p.m. The primary care clinic employs six full time regular physicians that consist of two pediatricians, an internal medicine doctor, and three general doctors. The Medical Director referred to these six physicians as the primary care providers. In addition, the Belaval Medical Center employs three part time physicians at the primary care clinic --a pediatrician and two general physicians-- who work a limited schedule. The part-time pediatrician works on Mondays through Fridays from 4:00 p.m. to 8:00 p.m. One of the generalist doctors works on Tuesdays and Thursdays from 4:00 p.m. to 8:00 p.m. and alternate Saturdays from 9:00 a.m. to 1:00 p.m. The other generalist physician only works on Fridays from 4:00 p.m. to 8:00 p.m. and may work an additional shift as indicated by the Medical Director.

The physicians' offices are located in a hallway with offices on each side. The generalists' offices are on one side and the pediatricians' offices on the other. The

record is unclear as to where the part-time physicians work physically but it may be inferred that they work in the same offices as the regular full-time physicians.

The primary care clinic also has three nurse stations with only three nurses assigned at any given time. There are also two clerical employees that work in two separate offices that constitute the patients' affairs offices for the Belaval Medical Center. There is also a waiting room and the registration area, where the front desk employees work. The Employer also employs a janitor and a security guard.

C. The Second Building

There is a second building across the street from the primary care clinic, where the Employer has a laboratory, a phlebotomy area, and some additional physicians' offices. There are two nurses assigned to the doctors in that building and one nurse each for the laboratory and phlebotomy area. The building has a small waiting room, a registration area, and an office space for a nutritionist and a health educator who has a bachelor's degree in health education. There are also Doctors in Pharmacy who work in this building in connection with services affiliated to the School of Pharmacy. The Office of the Administrator for the Belaval Medical Center is also in this building.

D. The Physicians

All of the medical doctors are supervised by Dr. Hector L. Villanueva, the Medical Director. He prepares their annual evaluations and is responsible for any discipline.

The physicians' most recent evaluation rates performance according to four specific criteria: (1) performance[4] (2) interpersonal relations and communication, (3) norms and procedures, and (4) attendance. With regard to the performance there are

[4] The translated documents has the word "execution" which I have changed to "performance" which more accurately describes the performance criteria.

eleven areas under review all relating to the exercise of professional medical functions that include patient evaluation, maintaining medical history, educating patients, ordering diagnostic studies, laboratory tests and interpreting them, referring patients to sub-specialists, assisting the court if so required and testifying, availability to attend to emergency cases when necessary, appropriate referrals, interviewing sufficient patients per day, and meeting clinical standards. In the most recent evaluations, physicians are not rated regarding their performance of management or supervisory functions.

No job descriptions were submitted as evidence in the official record. Although in his Brief Employer's counsel attaches and makes reference to three job descriptions for the physicians, they are new evidence and were not offered as exhibits. Without being properly introduced into the record, and without an explanation through testimony or other specific reference concerning what the tasks therein stated refer to specifically, the job descriptions are of very little, if any probative value. Further, the record does not reflect whether these job descriptions are still in effect.

In spite of this, a review of the job descriptions indicates that the physicians are professionals specializing in the field of medicine, rendering diagnostic and treatment services in one of the medical specialties. They are required to possess a medical license issued by the Puerto Rico Medical Examiners Board, a Federal Narcotics License issued by the "Drug Enforcement Administration", a state narcotics license, be on the Health Professionals Re-Certification and Registry, and be a member of the Puerto Rico Medical-Surgeons Association. The job descriptions specify that among the several tasks included, the physicians "supervise the performance of health professionals who offer services in the different clinical areas." There is no context or

explanation as to what this refers to, therefore as noted previously, it is of very little probative value.

There were no employment contracts submitted for regular full time physicians and their terms and conditions of employment are unclear, other than the information included in this Decision. Generally, physicians at the primary care clinic work from 8:00 a.m. to 4:00 p.m. Monday through Friday. They see patients pursuant to previously scheduled appointments or attend walk-ins. All physicians refer patients to a hospital if they need acute medical care and need to be hospitalized.

They provide patient care in conjunction with three nurses assigned to the primary care clinic, who prepare patients before they are examined by a physician. The nurses take the patient's blood pressure, temperature, height and weight and record the information in the patient's file. The nurses may perform other tasks if required by a doctor because they are medically necessary, such as administering respiratory therapy.

The part time physicians work pursuant to an employment contract that is limited by its terms to "a determined period." The contract specifies that due to the service needs of the Belaval Medical Center the physician is being hired through a temporary contract for a specific period, until such time as the Medical Center determines whether it is necessary to maintain that position as a permanent position. Dr. Lorna Vega, a pediatrician, has a contract effective from May 11, 2009 through May 11, 2010 and works twenty hours a week on a schedule of Monday through Fridays from 4:00 p.m. to 8:00 p.m. Dr. Alwin Torres, a physician, has a contract effective from May 11, 2009 through May 11, 2010 and works Tuesdays and Thursdays from 4:00 p.m. to 8:00 p.m.

and alternate Saturdays from 9:00 a.m. to 1:00 p.m. Dr. Carmen M. Echevarria, a generalist physician, has a similar contract with a very short work schedule, working only on Fridays from 4:00 p.m. to 8:00 p.m. and any additional shifts as indicated by the Medical Director. There is no evidence in the record concerning whether or not these physicians have had contracts renewed or whether these contracts are entirely new. There is also a lack of evidence in the record concerning whether or not they have expectations to be retained beyond their established period.

A few references are made in the record of occasions when one of the regular full-time physicians has reported to Nereida Ortiz, a Nurse Supervisor, incidents that affect patient care. As such, physicians have reported to the Nurse Supervisor whether a particular nurse is too slow to be assigned to a particularly fast-paced area, or whether errors or omissions have occurred with regard to patient care, such as incorrectly recording a person's weight, that need to be specifically addressed. In all of these cases, the physician reported the matter to the Nurse Supervisor, and was not empowered to act on his or her own authority to take corrective measures or actions. As more fully explained below, the Nurse Supervisor will evaluate the situation and determine the proper course of action.

E. The Nursing Department

The Employer employs approximately ten nurses between the two buildings discussed previously. Only three nurses at any given time work directly with the physicians that provide care at the primary care clinic. Other nurses are assigned to the laboratory, the phlebotomy area, and the OB-GYNs offices. At the head of the department is a Nurse Supervisor, Ms. Nereida Ortiz, a registered nurse (RN). She is

responsible for the assignment of work to each of the nurses through the preparation of a daily plan specifying their starting and ending times, their lunch breaks and rest periods, and their designated areas of work, ensuring sufficient coverage in all areas. Ms. Ortiz is also the only person authorized to rotate the nurses or transfer them within different work areas to address any deficiencies or physicians' complaints. She is also the only person authorized to approve annual and sick leave for the nurses.

Ms. Ortiz does not work with physicians on a daily basis, but she will address any complaints or concerns regarding the nursing work, and she is the person responsible for resolving any situation concerning the nurses' performance.

Ms. Ortiz is also responsible for evaluating the nurses and in the performance of this function, she meets with each of the physicians and obtains their feedback and opinion with regard to each of the nurses assigned to the physician's area. However, when completing the evaluation, no particular physician has exclusive weight or authority with regard to how a particular nurse is evaluated, and Ms. Ortiz forms her own opinion and uses her own judgment with regards to the evaluations. It certainly cannot be said that her duties in this regard are purely ministerial in nature. Rather, she compiles data from each of the physicians with regard to all of the nurses, and using her own criteria as to how nursing work should be performed, and her own observation with regards to timeliness, punctuality, professionalism, personal dealings with each of the nurses, and other criteria, she concludes whether the nurse performed the work adequately or not.

Ms. Ortiz is also the only person with authority to discipline nurses, which the physicians cannot do independently. Physicians report errors, mistakes or omissions by

nurses to Ms. Ortiz, who is then responsible for attending to the matter. A physician may recommend discipline, but it is ultimately Ms. Ortiz who determines whether or not discipline is appropriate, and if so, what kind and how severe a disciplinary need be imposed. Physicians do not have authority to either independently discipline or to make a specific recommendation of such weight that it should be obeyed without any independent review by Ms. Ortiz.

For example, on one occasion Ms. Ortiz received complaints from a physician regarding a nurse who had incorrectly recorded a person's weight. The physician called Ms. Ortiz to report the matter and recommended that the nurse be disciplined. However, Ms Ortiz also met with the nurse concerned and made her own determination that the mistake was unacceptable and decided which discipline to administer and how severe. In this respect she prepared a disciplinary memorandum containing her signature, warning the employee that a recurrence of the mistake or omission could result in discharge. When determining the severity of the disciplinary measure, she took into account the fact that in her view the mistake was one that could affect a patient's health, and also that it was not the first time. In the disciplinary memorandum, she also memorialized the fact that she had conducted training just days prior to the incident about that very matter, which the employee had ignored.

In another case, a physician complained about another nurse, indicating that he did not want to work with her personally. That particular physician called Ms. Ortiz and in her presence told the nurse that she could not see his patients that the nurse did not have to tell the patient what to do because that was his role, and that he was not going to allow her to see his patients any longer. In that particular case, the physician

recommended that the nurse be discharged. However, Ms. Ortiz determined that the appropriate course of action was to remove her from that area and transfer her to another department. She also gave the nurse a disciplinary memorandum for displaying inappropriate attitudes at work. In transferring the nurse and administering discipline, Ms. Ortiz considered in addition to the particular physician's complaint, the fact that she had received complaints about this nurse from other physicians because of her attitude and her poor work performance.

It is noteworthy that in this particular case, contrary to the doctor's recommendation, the nurse was not discharged. In fact, prior to transferring the nurse to another work area, Ms. Ortiz met with Dr. Hector L. Villanueva, the Medical Director and the Human Resources Manager, because in her opinion the physician had exceeded his authority. She discussed with both of them the fact that the physician displayed inappropriate behavior showing extreme anger, yelling, and other conduct critical of the physician's handling of the situation and concluding that his behavior was very inappropriate. Dr. Villanueva addressed the matter with regards to any discipline issued to the physician. But as a result of the independent review of the situation and the consultation at the meeting, Ms. Ortiz concluded that the nurse should be transferred and not discharged.

Ms. Ortiz is also the only person authorized to hire, fire, and discipline nurses, in consultation with the Human Resources Director and with the Medical Director. For example, she hired a nurse who was highly recommended by physicians who had worked with her before, but Ms. Ortiz made her own independent evaluation of the nurse's qualifications, and her own conclusion that there was a need for additional

nurses. None of the physicians have the prerogative to effectively require the hiring of a particular nurse or other personnel. They can however, recommend and give good or bad references about a potential employee.

Nurses report to Ms. Ortiz when they are going to be absent, and Ms. Ortiz approves or disapproves any request for leave. She will move or reassign nurses to address any personnel shortages caused by absences. No one else has this authority while she is in the office. During her absence, the Human Resources Manager or the Medical Director will have the authority to perform any of her assigned tasks or duties.

With regard to labor relations, the nurses are already represented for collective bargaining purposes by the Petitioner. Ms. Ortiz attends to grievances at the first step. The Employer also has a Human Resources Manager that deals with issues arising out of the collective bargaining agreement. The physicians are not in any way involved in the adjustment of grievances or issues of labor relations involving the nurses or other personnel.

IV. ANALYSIS

1. Supervisory Status

a. General Principles Relating to Supervisory Status

Section 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. See KGW-TV, 329 NLRB 378,

381 (1999). The requirement of the use of independent judgment, however, is conjunctive; thus, an individual is not a supervisor unless the individual exercises authority with the use of independent judgment and holds the authority in the interest of the employer. Id.

The requirement that independent judgment be exercised imposes a significant qualification that limits the definition of "supervisor" to include only people whose exercise of any of the 12 stated Section 2(11) authorities is not merely routine. In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives," and employees - such as "straw bosses, leadmen, set-up men, and other minor supervisory employees” - who enjoy the Act's protections even though they perform “minor supervisory duties." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

In Oakwood Healthcare, Inc., 348 NLRB 686, 692 (2006), the Board adopted an interpretation of “independent judgment” that focuses on the degree of discretion involved in making a decision, not on the kind of discretion involved (e.g. professional or technical). For an individual’s judgment to be “independent” within the meaning of Section 2(11), the individual must form an opinion or evaluation by discerning and comparing data. Id. at 692-693. As the Board explained, “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” Id. at 693. The Board recognized

that at one end of the spectrum there are situations where there are detailed instructions for the actor to follow, but that at the other end there are situations where the actor is wholly free from constraints. Id. It found that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement[,]" but that a judgment is independent even where there is a guiding policy so long as that policy allows for discretionary choices. Id. Similarly, "if [a] hospital has a policy that details how a charge nurse should respond in an emergency, but the charge nurse has the discretion to determine when an emergency exists or the authority to deviate from that policy based on the charge nurse's assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment." Id. at 693-694.

Additionally, the judgment that a putative supervisor exercises must "rise above the merely routine or clerical" for it to be truly supervisory within the meaning of Section 2(11). Id. at 693. "If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data." Id.

Consistent with the congressional intent to distinguish between truly supervisory personnel and those who merely perform minor supervisory duties, the Board is careful not to construe supervisory status too broadly, for a worker who is deemed to be a

supervisor loses his organizational rights. See KGW-TV, 329 NLRB 378, 381 (1999). The burden of proving supervisory status is on the party asserting it. See NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001). Conclusory evidence is not sufficient to establish supervisory status. See Golden Crest Healthcare Center, 348 NLRB 727, 731 (2006).

In this case it is absolutely clear that the physicians do not have the actual authority to exercise any of the criteria established by Section 2(11) in defining supervisory status. Thus, physicians do not have the independent authority to hire, fire, transfer, suspend or discipline, lay off, recall, promote, assign, reward, or discipline other employees, or to adjust their grievances. Thus it is clear in the record that the physicians must report any concerns regarding the performance of nursing work to the Nursing Director, and that they are not authorized to take any of the above actions on their own authority.

b. Authority to Effectively Recommend

The Employer's position here seems to be that the physicians are supervisors rests on the argued authority of physicians **to effectively recommend** the hire, transfer, or discipline a nurse, and to responsibly direct them. Although the Act does not define the term "effectively to recommend", the Board has interpreted them to mean that the person who carries out the final action is compelled to act according to the "recommendation" and thus, does not have any independent authority to examine "the recommended action." In other words, the authority to "effectively recommend" generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendations ultimately are followed.

See Bellaire Medical Center, 348 NLRB 940, 954 (2006); Children's Farm Home, 324 NLRB 61, 61 (1997). Such is not the case here. In fact, the record reflects quite the opposite. It reflects that the Nurse Supervisor retains the independent authority to review and evaluate any recommendation made to her by physicians with regard to the hiring, discipline, and transfer of employees within her department.

The fact that a nurse was hired after receiving favorable recommendations from several physicians does not in itself establish that the physicians' input in the hiring process is accepted without independent investigation by higher authorities. The evidence shows that the Nurse Supervisor and the Medical Director are the officials in charge of the hiring process and make decisions on whether to hire, and who to hire, and that physicians have only an advisory participation in that process. The Nurse Supervisor remains actively involved in making her own judgments throughout the selection process, and it cannot fairly be said from that sole example, that the physicians are the real decision-makers regarding hiring.

Equally, the record also failed to show that the physicians have the authority to make effective recommendations of transferring and disciplining nursing personnel. While there is evidence that on occasions physicians have recommended that a particular nurse be disciplined or transferred for poor performance, the nursing supervisor has retained an independent prerogative on whether or not to follow that particular recommendation and in determining the proper course of action, without merely acceding to the physician's requests. Thus, the record reflects that many recommendations have been made with regard to discipline and transfer of nurses that have not been followed, and also that Ms. Ortiz has retained an independent judgment

in deciding whether to impose a discipline other than the one recommended by physicians. In the absence of evidence showing that higher authorities were compelled to agree to the physicians' recommendations, it cannot be said that the physicians are supervisors based on effective recommendations of discipline or transfer. Third Coast Emergency Physicians, P.A., 330 NLRB 756 (2000) (physicians are not supervisors when the record shows that the authority to hire, discipline and evaluate was retained by two medical directors, and there was "insufficient evidence to establish that the recommendations of the physicians are effective or that the physicians formulate and effectuate management policy."); Vencor Hospital-Los Angeles, 328 NLRB 1136, 1139 (1999).

c. Authority to Evaluate

Section 2(11) does not list "evaluate" as one of the 12 identified supervisory functions. Accordingly, preparation of evaluations, without more, cannot confer supervisory status. See Norton Audubon Hospital, 350 NLRB 648, 663 (2007). The Board's policy is that for evaluations to constitute evidence of supervisory status they must directly, by themselves, affect the wages and/or job status of the employee being evaluated or they must effectively recommend personnel action. See Franklin Home Health Agency, 337 NLRB 826, 831 (2002); Coventry Health Center, 332 NLRB 52, 53-54 (2000). In the absence of evidence demonstrating that evaluations effectively recommend personnel action, such evaluations serve primarily a reporting function, not a supervisory one. See Chevron U.S.A., 309 NLRB 59, 61 (1992)

Here, the evidence is insufficient to establish that the physicians are supervisors based on their role in evaluating other workers. The physicians provide job

performance information to higher authorities to allow those officials to prepare evaluations. The evidence does not establish that the physicians' role in providing that information amounts to providing effective recommendations. The record is not sufficient to permit the conclusion that the higher authorities lack an independent basis for the evaluations that they issue and that they merely acquiesce to the physicians' assessments. Moreover, the physicians do not have an active role in preparing nurse evaluations, and it appears that their role in the nurse evaluations is merely one of reporting their personal assessment.

2. Appropriate Unit

Section 2(12) of the Act recognizes professionals as employees for purposes of the protections granted by the Act. The Board has long held that a unit of professional employees as defined in Section 2(12) of the Act may include only staff doctors and that such a unit constitutes an appropriate bargaining unit separate from other professional employees. Third Coast Emergency, supra, Montefiore Hospital and Medical Center, 261 NLRB 569 (1982). In fact, such units are presumed to be appropriate in the context of acute care hospitals. 284 NLRB 1515 et. seq. (Section 103.30)

In this case, the Petition includes all physicians employed by the Employer at its facility in San Juan, Puerto Rico. This unit is presumed to be appropriate. However, the record has revealed that the Employer employs both regular full time physicians and part time physicians contracted for a determined period and the Union has opposed the

inclusion in the Unit of part time physicians on grounds that they do not work a sufficient number of hours to constitute regular employees.

The record reflects that the part time employees that work at the primary care clinic have a contract for a specific time period. Although the record is scarce with regard to their working conditions, I deem that there is sufficient evidence to determine that they should be included in the unit description. The Board holds that it is appropriate to include part time employees together with full time employees in the same unit whenever the part time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar periods to demonstrate that they have a substantial and continuing interest in the wages, hours, and working conditions of the full time employees in the unit. New York Display & Die Cutting Corp., 341 NLRB 930 (2004), Arlington Masonry Supply, Inc., 339 NLRB 817 (2003). Factors such as the regularity and continuity of employment, tenure of employment, similarity of work duties, and similarity of wages, benefits and other working conditions are taken into account. Arlington Masonry, supra at 819. In cases where a part time employee has worked an average of 4 hours a week or more in the quarter preceding the eligibility date, the employee has been included in the unit. Davison-Paxon Co., 185 NLRB 21 (1970). Accordingly I conclude that in this case the part time physicians work a sufficient number of hours in a sufficiently similar position to the regular full time employees as to be included in the unit.

I also find that the part time physicians have a sufficient expectancy to continue working beyond the specific terms established in their contracts to be considered regular employees for purposes of the Act and to be included in the appropriate unit. In

making this finding, I rely on the language included in their contracts indicating that an extension to their contracts or the conversion of the position to a permanent position will be determined based on the service needs of the Belaval Medical Center. This language, in my opinion, creates a sufficient expectancy that the position will become permanent, regular or that the contracts will reasonably be extended.

The Board in Marian Medical Center, 339 NLRB 127, 128 (2003) (internal citations and quotation marks omitted.) stated:

> When determining whether an employee classified as temporary is eligible to vote, the Board examines whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created… In the context of the voting eligibility of a temporary employee, whose community of interest with the unit employees is uncertain, the Board inquires whether the termination of the temporary employment is sufficiently finite to dispel reasonable contemplation of the employee's continued employment beyond the term for which he was hired.

I find that in this case, by virtue of the above-cited clause in their contracts, the end of the contracts are not sufficiently finite or certain as to dispel a reasonable contemplation by the part time physicians of continued employment beyond the term for which they were initially hired. Accordingly they are included in the appropriate unit.

CONCLUSION

For the reasons stated above, I conclude that the regular full time physicians and the part time physicians who work at the primary care clinic are employees who may be included in the petitioned-for bargaining unit.

Pursuant to this determination, I shall direct an election among all regular full time and part time professional physicians working at the Employer's facility in San

Juan, PR, and excluding all other employees, guards and supervisors as defined in the Act.

There are approximately 9 employees in the appropriate bargaining unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Unidad Laboral de Enfermeras (os) y Empleados de la Salud (ULEES). The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the

election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **March 5, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website,

www.nlrb.gov,[5] by mail, or by facsimile transmission at (787) 766-5478. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*s, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **March 12, 2010.**

[5] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[6] but may not be filed by facsimile.

DATED: February 26, 2010

/s/

Marta M. Figueroa
Regional Director, Region 24
National Labor Relations Board
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Website: www.nlrb.gov

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[6] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.